Supreme Court, U.S.
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No. 96-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

TOWN OF BRIMFIELD and CYNTHIA K. POWERS,

Cross-Petitioners,

vs.

MARY E. LEONARD,

Cross-Respondent.

Conditional Cross-Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED

Whether the Supreme Judicial Court of the Commonwealth of Massachusetts erred when it analyzed Cross-Respondent's "regulatory takings" claim under a tri-partite standard of review, and in so doing, suggested that such a standard of review was mandated under federal law?

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OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 423 Mass. 152 (1996). See Petitioner/Cross-Respondent's Appendix at p. A1-A18.

STATEMENT OF JURISDICTION

On July 11, 1996, the Supreme Judicial Court of the Commonwealth of Massachusetts affirmed a decision of the Superior Court of Hampden County in favor of the Cross-Petitioners/Respondents [hereinafter "the Town"], which had been entered on April 13, 1994. Cross-Respondent/Petitioner [hereinafter "Leonard"] filed her petition for a writ of certiorari on September 12, 1996, and it was placed on the docket on the same day.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Rule 12.5 of the Rules of the Supreme Court of the United States, and is conditional upon this Court's grant of Leonard's petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part:

> "....nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law...."

STATEMENT OF THE CASE

The Town relies upon, and incorporates by reference, the Statement of the Case presented in its Brief in Opposition to Petition for Writ of Certiorari, *Mary E. Leonard v. Town of Brimfield and Cynthia K. Powers*, United States Supreme Court Docket No. 96-389.

The issue raised in this conditional cross-petition, the applicability of a three-pronged "standard" of review argued by Leonard on appeal, was raised before the Massachusetts Supreme Judicial Court both in the Town's brief and at oral argument. Specifically, the Town argued that the trial judge correctly applied regulatory takings law in his determination that no compensable taking had occurred, and that there was no meaningful distinction between federal and Massachusetts state caselaw on the takings issue. The Town further challenged the validity of Leonard's assertion that a specific, three-pronged analysis was required by federal law in situations where the governmental action challenged has not deprived the landowner of all economically viable use of his or her land,

amount to a physical invasion of the property, as is the case here. *See* Brief of the Defendants-Appellees at 28-29, *Leonard v. Town of Brimfield, et al.*, 423 Mass. 152 (1996) (No. SJC-07008).

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

I.

IN THE EVENT THAT THIS COURT GRANTS THE PETITION FOR WRIT OF CERTIORARI, JUST RESOLUTION OF THE ISSUES PRESENTED IN THE PETITION REQUIRE THE COURT TO CONSIDER WHETHER FEDERAL LAW MANDATES THE APPLICATION OF A THREE-PART "TEST" IN DETERMINING WHETHER A CHALLENGED GOVERNMENTAL REGULATORY ACTION, WHICH DOES NOT DEPRIVE A LANDOWNER OF ALL ECONOMICALLY VIABLE USE OF HIS OR HER LAND AND DOES NOT CONSTITUTE A PHYSICAL INVASION OF THE PROPERTY, AMOUNTS TO A COMPENSABLE "TAKING" UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Should this Court grant the petition for a writ of certiorari in the present case, it will be called upon to review whether, on the facts as summarized by the Massachusetts Supreme Judicial Court [hereinafter "SJC"] and supported by the record, the Zoning Board of Appeals' June 2, 1987 grant of a Special Permit to Leonard, which did not deprive her of all economically viable use of her property and did not constitute a physical invasion of her property, amounted to a compensable taking under the Fifth Amendment to the United States Constitution. The Fifth

Amendment provides, in pertinent part, that "...private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.[1]

In its analysis of this issue, the SJC reviewed three factual criteria proffered by Leonard, which she contended the court was required to consider under federal regulatory takings caselaw. *See* Brief of the Plaintiff-Appellant at 13-14, *Leonard v. Town of Brimfield, et al.*, 423 Mass. 152 (1996) (No. SJC-07008). Despite the Town's arguments on appeal that federal law does not require application of such a three-pronged test in the circumstances presented, and that, in fact, Supreme Court precedent clearly establishes that there is *no* bright-line test or inquiry in regulatory takings cases (*see, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)), the SJC adopted Leonard's proffered test and applied it in its decision. *See* Petitioner/Cross-Respondent's Appendix at p.A8. On this point, the SJC stated

> When a regulatory action involves neither a physical invasion nor a complete deprivation of use, as in the case here, *Federal law has established several interrelated factors which are to be considered* in determining whether a compensable taking has occurred; "(1) 'the economic impact of

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[1] The so-called "takings clause" of the Fifth Amendment is applicable to the States through the Fourteenth Amendment of the United States Constitution. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160 (1980).

> the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986), quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) [emphasis added]. Petitioner/Cross-Respondent's Appendix at p.A8.

While the Town does not dispute that the above-listed "interrelated factors" have been considered by the federal courts in certain contexts, as pertinent to a takings analysis, no federal court has ever announced these factors to be the standard or test which must be applied in each and every case alleging that governmental regulatory action constitutes a compensable "taking" under the Fifth Amendment. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (Court identifying several relevant factors in analysis but reiterating that each case involves a fact specific "ad hoc" inquiry).

In fact, such an interpretation is unwarranted based upon the current state of federal case law, in which the Supreme Court has consistently cautioned that "we have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment...." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) [citations omitted]; *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) ("As has been admitted on numerous occasions, this Court

has generally been unable to develop and 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action must be deemed a compensable taking" [citations and other internal quotations omitted]).

Thus, the language used by the SJC in its decision improperly confines the case-by-case, "ad hoc, factual inquiry" in takings claims under federal law where the landowner has retained some if not all use of his or her property, to the consideration of these three factors, presumably to the exclusion of other considerations, in a manner contrary to earlier teachings of this Court. The SJC was simply incorrect in its annunciation of a definitive standard of review under federal law in regulatory takings cases, and should this Court grant Leonard's petition for a writ of certiorari, it must consider the propriety of the SJC's statements in this regard.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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